Supreme Court, U.S.
FILED

No. 991572 MAR 13 2000

OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1999

WILLIAM H. VIEHWEG - Petitioner

vs.

SUSAN H. MELLO - Respondent

On Petition for Writ of Certiorari
to United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. VIEHWEG
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Phone: (217) 999-5061
Petitioner

58pp

QUESTION PRESENTED FOR REVIEW

The question before the court is whether non-attorney parties have lesser constitutional rights than attorney parties when representing themselves in the federal courts under U.S.C. 28 §1654, and whether the eighth circuit court's application of the statute in this case, in direct conflict with its own and other circuit's prior opinions and policies, constitutes such an extreme departure from the accepted and usual course of judicial proceedings, including the sanctioning of such a departure by the district court, that it calls for an exercise of this Court's supervisory power.

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CASE CITATIONS

The final judgment by the United States District Court is cited as *Viehweg v. Mello* 5 F.Supp 2d 752 (E.D. MO. 1998). The final opinion by the United States Court of Appeals, Eighth Circuit, was issued *per curiam* and not published.

BASIS OF JURISDICTION

This petition is timely, as the opinion sought to be reviewed, the final opinion by the United States Court of Appeals, Eighth Circuit, was filed on October 18, 1999, and the order denying the petition for rehearing was filed on December 14, 1999.

This Court has jurisdiction to hear this petition for writ of Certiorari based upon U.S.C. 28 §1254.

STATUTE INVOLVED IN CASE

U.S.C. 28 §1654: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

STATEMENT OF THE CASE

UNDERLYING CASE

This case began when Respondent Mello, a Missouri lawyer, agreed to represent Petitioner Viehweg as to matters involving his discharge from his previous employer. Viehweg expected that Mello would pursue possible causes of action against two former co-employees for tortious interference of Viehweg's employment relationship with the employer, and against the employer for intentionally damaging Viehweg's work history. Mello engaged in several correspondences with the employer's attorney. Mello then requested that Viehweg provide her information about any previous lawsuits in which he had been involved. Viehweg did. Upon receiving the information, which included *pro se* lawsuits including legal malpractice, Mello immediately terminated her representation of Viehweg.

Viehweg proceeded, pro se, to file his law suit against his previous two co-employees and employer in federal court. Viehweg litigated his suit for two years before he was able to obtain the legal services of two attorneys to represent him in the case. Viehweg's suit survived a motion for summary judgment by all defendants, and was eventually settled in a court ordered settlement conference with Viehweg receiving $60,000.00.

DISTRICT COURT

On February 10, 1997, Viehweg filed his legal malpractice complaint against Mello in the United States District Court, Eastern District, Eastern Division, No. 4:97CV00211TCM. By mutual consent, the case was assigned to magistrate judge Thomas C. Mummert. The complaint contains two counts of negligence and one count of constructive fraud, alleging that Mello was negligent when she failed to recognize two of Viehweg's causes of action, and that she intentionally breached her fiduciary duty to him when, though she did recognize Viehweg's third cause of action, she abandoned Viehweg's

claim due to unrelated matters - Viehweg's previous *pro se* history. Viehweg's complaint alleges that Mello could not have withdrawn for ethical reasons if two other attorneys found it ethical to represent Viehweg, and that Mello could not argue that Viehweg's claims against his former co-employees and employer were meritless if a federal court judge found them to have merit.

In response to Viehweg's service of process, Brian Plegge of the law firm of Moser and Marsalek entered his law firm's appearance in behalf of the defendant Mello when he filed a motion to dismiss. Just weeks later, Mello filed her notice of entry of appearance for herself as co-counsel. (See Appendix-A3) Mello's entry of appearance contains a certificate of service and service was made upon Viehweg. From this point forward in the district court case, Mello will represent herself while she is simultaneously represented by legal counsel.

Viehweg challenged Mello's notice of entry of appearance for herself with a motion under Rule 11 of the Federal Rules of Civil Procedure, arguing that Mello had to of known that the law does not allow her to enter her appearance for herself as co-counsel.

In response to Viehweg's challenge to Mello's self-representation, Mello filed the following legal argument with the court: "as recognized under Missouri law .... a party may have as many counsel as a party desires .... it would be contrary to constitutional principles, including due process, to seek to deprive Defendant of her right to represent herself". And Mello's attorney Plegge filed the following legal argument: "defendant is completely unaware of any case law, statutes or other authority which indicate that an attorney cannot represent themselves and file a pleading on behalf of themselves .... to defend themselves in a civil litigation".

Discovery in the case commenced under a track 2 (standard) case management order with all discovery due to be completed by November 1, 1997 (six months). In a letter to Viehweg, both

Mello and her attorney demanded that Viehweg serve both Mello and her attorney, and that service upon only her attorney would be considered improper. In another letter to Viehweg Mello demanded that Viehweg treat Mello not just as a party, but also as an attorney representing the defendant party.

During discovery both Mello and her attorney served Viehweg with independent and often duplicate requests, both issued subpoenas under their own signature, both attempted to independently resolve discovery disputes, both engaged in numerous and independent correspondences with Viehweg, and both filed independent and often duplicate motions to compel. In one instance concerning Mello's deposition, her attorney filed a motion requesting a simple delay, only to have Mello counter his motion, through an amended motion, demanding that she not be required to submit to an oral deposition at all. Under the weight of this confusion, the discovery process broke down.

In response Viehweg filed motions requesting protective relief, arguing that he was being harassed by Mello's dual representation, and further requesting that the failed case management order be withdrawn and a new one created. Viehweg further requested that the court adopt a more hands-on approach to the case. Viehweg wrote in one of his pleadings that he "is now afraid of pursuing this action as a pro se ... and that this fear ... [is a] product of the defendant's ... intentional design". Viehweg wrote in another of his pleadings that the "defendant has acted intentionally and wrongfully to harass and attack the plaintiff's status as a pro se for the wrongful purpose of causing the plaintiff to fear litigating his action to the point of inaction ... and that the plaintiff has become afraid of ... initiating discovery." Mello responded by suggesting that the court appoint a *guardian ad litem* for Viehweg.

During the first eight months of the case while Mello was represented by legal counsel, Mello filed with the court, under her name only, some fourteen pleadings and five memorandums

of law. Mello served upon Viehweg an additional ten pleadings and tried, unsuccessfully, to file them with the court.

Three weeks after the close of discovery, on November 17, 1997, the district court held its first discovery motion hearing, and addressed all the above mentioned motions. Even though Judge Mummert found that Mello and her attorney's duplicate pleadings had gotten "ridiculous" and that it was "double-teaming Mr. Viehweg and it's just not fair", the judge found all of Viehweg's motions to prevent Mello from representing herself as co-counsel to be frivolous. The judge ruled that Mello had a "right" to act as her own co-counsel (he repeated the word five times) and would allow no further argument on the issue. (See Appendix-A4)

During the November 17th hearing, Joseph Mueller, the senior partner of the law firm of Moser and Marsalek (which consist of some thirty attorneys), entered his appearance in behalf of Mello. The court commended Mr. Mueller's reputation in the legal and judicial community. Mr. Mueller represented to the court that he would personally see that all discovery issues are properly addressed. A few days later, Mr. Mueller, Mr. Plegge, and the law firm of Moser and Marsalek, withdrew from representing Mello.

About a week later, the law firm of Brinker & Doyen, through Scott C. Harper, entered its appearance on behalf of Mello.

Throughout the remaining district court action, Mello continued to represent herself jointly with her new counsel. Ultimately, the court ruled upon Mello's motion for summary judgment and found in Mello's favor. See Appendix-A23, A24. Mello, under her own signature, filed a bill of costs and declared, under the threat of perjury that her claimed $3900 in costs were necessary. Viehweg filed an opposition arguing that few, if any, of Mello's claimed costs were necessary and provided case law as precedent. The trial court ruled on Mello's bill of costs and allowed only $253. It disallowed ninety-four percent (94%) of her request.

APPELLATE COURT

Viehweg appealed the district court's final judgment to the United States Appeals Court for the Eighth Circuit, which was docketed on June 30, 1998 as No. 98-2732EMSL, with the law firm of Brinker & Doyen continuing its representation of Mello.

Two weeks later Mello filed her notice of entry of appearance as co-counsel for herself. (See Appendix-A6) Mello's notice did not contain a certificate of service, and no service was made upon Viehweg. It wasn't until a month later that Viehweg, while personally verifying the court's file, discovered Mello's entry of appearance. Viehweg immediately filed a motion to disqualify Mello as her own co-counsel. Mello's attorneys responded in opposition arguing that "Appellant fails to direct this court to any statute or court rule stating that Appellee Mello may not enter her appearance as counsel on her own behalf. Appellee is unaware of any such statute or rule preventing a party from acting as her own counsel if she is a licensed attorney". The appellate court denied Viehweg's motion to disqualify. Viehweg sought relief through a writ of mandamus to the this Court.

SUPREME COURT - MANDAMUS

On September 18, 1998, this Court docketed Viehweg's petition for a writ of mandamus, under the heading In Re William H. Viehweg, as No. 98-467. Viehweg's petition argued that Mello could not represent herself as co-counsel, and cited U.S.C. 28 §1654. Mello's response brief in opposition, by and through her attorney Gary P. Paul of the law firm of Brinker & Doyen, argued that "While Respondent did enter her appearance as co-counsel with other defense counsel, it has not had and cannot have any bearing on Petitioner or the appeal .... Respondent ... would be filing only one brief.... The law is clear that just as Petitioner is entitled to represent himself pro se that there is nothing improper for a party/attorney to represent himself or herself in litigation." On November 13, 1998 Gary

P. Paul and his law firm of Brinker & Doyen filed their motion for leave to withdraw as Mello's counsel. Mello filed her entry of appearance for herself in a "pro per" capacity. (See Appendix-A7) On November 16, 1998 this Court entered its order denying Viehweg's petition for writ of mandamus. (See Appendix-A8), without ruling on Brinker & Doyen's motion.

APPELLATE COURT - CONTINUED

Viehweg's brief in the appellate court addressed the issue of whether Mello had the legal standing to act as her own co-counsel in the trial court and whether it prejudiced Viehweg, and cited U.S.C. 28 §1654.

On November 9, 1998 Mello's attorneys from the law firm of Brinker & Doyen submitted her brief in opposition. Three days later Scott C. Harper and the law firm of Brinker & Doyen (a firm of some fifteen attorneys) filed their motion to withdraw as Mello's counsel. On the same day, Mello filed a motion for permission to file corrected brief, alleging the need to correct errors and omissions in the brief filed by her attorney. (See Appendix-A9) Viehweg filed an opposition arguing that the proposed corrected brief had little or no resemblance to the original. Mello filed a supplemental motion alleging, among other things, that her attorneys had filed the original brief "against her direction". (See Appendix-A10) The appellate court granted the law firm of Brinker & Doyen's motion to withdraw as Mello's counsel, and granted Mello's motion to submit a corrected brief. A little over a week later, Gerard T. Noce, the senior partner of the law firm of Noce & Buckley, entered his and his law firm's appearance as Mello's legal counsel. Viehweg filed his reply brief.

Mello's corrected brief argues that "the district court did not abuse its discretion in ... allowing Mello to enter as co-counsel with her defense counsel where no statute, case law, or professional ethical rule prevents Mello from acting as her own counsel".

Viehweg continued to research the law as to whether Mello had a right to simultaneous representation with her legal counsel. Toward the end of March, 1999, Viehweg submitted a letter to Michael E. Gans, Clerk of Court, listing the cases that Viehweg had newly found and showing the relationship of the cases to the issue raised in Viehweg's brief. (See Appendix-A11)

Viehweg also filed a motion for a protective order to require Mello to comply with U.S.C. 28 §1654 and the eighth circuit court policy regarding representation. (See Appendix-A13) The motion argued that there was no right to simultaneous representation by a party and their legal counsel and that the eighth circuit had a policy against even considering pro se motions by parties represented by counsel. Viehweg included a memorandum of law outlining the numerous cases from multiple appellate circuits supporting his arguments. (See Appendix-A17) Mello personally responded in opposition arguing that U.S.C. 28 §1654 does not limit representation, that Mello's case is differentiated because she is "appearing as an attorney", and that she has a right to represent herself jointly with legal counsel. (See Appendix-A20) The court clerk, Michael E. Gans, ordered Viehweg's motion for a protective order taken with the case for consideration by the panel. (See Appendix-22)

Throughout the appellate court process, and while she was represented by legal counsel, Mello personally filed ten (10) documents seeking relief from the court.

On June 29, 1999, Viehweg went to the Eighth Circuit Court at 1114 Market Street in St. Louis, and spoke to Chief Deputy Clerk Robin Weinberger about status for oral argument in his case. Weinberger told Viehweg that the court had an unwritten policy prohibiting oral argument by non-attorney pro se's. She said the policy affected Viehweg, but did not affect Mello, as she was an attorney pro se. Viehweg submitted an affidavit to the court concerning this conversation.

On October 18, 1999 the court filed its per curiam opinion, concluding summary judgment was proper, and denying Viehweg's motion for protective order (See Appendix-A1)

Viehweg filed a petition for rehearing On December 14, 1999 the court denied the petition (See Appendix-A2)

ARGUMENT

The question before the court is whether non-attorney parties have lesser constitutional rights than attorney parties when representing themselves in the federal courts under U S C 28 §1654, and whether the eighth circuit court's application of the statute in this case, in direct conflict with its own and other circuit's prior opinions and policies, constitutes such an extreme departure from the accepted and usual course of judicial proceedings, including the sanctioning of such a departure by the district court, that it calls for an exercise of this Court's supervisory power

U S C 28 §1654 states the following "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein"

The federal courts have consistently interpreted the "or" in the statute in the disjunctive The courts have found that a party has the right to *pro se* self-representation, or, a party has the right to be represented by retained counsel, but, a party has no right to represent themselves *pro se* and simultaneously be represented by retained counsel There is no right to "hybrid" representation The courts have also consistently held that in order for a party to assert its right to appear *pro se*, the party must immediately discharge any retained counsel, else waive the right to appear *pro se* No court has ever exempted any party from these interpretations

The controlling law, and expository opinion, on this subject was made by the Eight Circuit itself in *Brasier v. Jeary*, 256 F 2d 474,478 (8th Cir), *cert. denied*, 358 U.S. 867, 79 S Ct 97, 3 L Ed 2d 99 (1958) In the case, the court stated

> "We conclude that the appellant has no constitutional or other right to conduct his own case *pro se* and have the aid of counsel to speak and argue for him at the same time"

Brasier has been substantially cited over the years, as recently as *U.S. v. Agofsky* 20 F 3d 866 (8th Cir 1994)

That attorney parties are not treated any differently under U S C 28 §1654 is addressed in *Frank M. McDermott, LTD. v Moritz* 898 F 2d 418,422[8] (4th Cir 1990) Mr Moritz, an attorney, was a defendant in a civil action and wanted to represent himself pro se though he was already represented by retained counsel In *Frank*, the Fourth Circuit wrote the following

> "Finally, we do address on the merits appellant's third and last assignment of error, viz., that the district court erred in allowing defendant Moretz to represent himself and his law firm, while both were also represented by retained counsel In this case, because the defendant and his firm were represented by retained counsel, defendant Moretz had no right to proceed *pro se* *O'Reilly v. New York Times Co.*, 692 F 2d 863,868 (2d Cir 1982), Cf *United States v. Zielie*, 734 F 2d 1447,1454 (11th Cir 1984), cert denied sub nom *Gustafson v. United States*, 469 U S 1189, 105 S Ct 957, 83 L Ed 2d 964 (1985) In order for defendant Moretz to have proceeded *pro se* he must have immediately discharged the other attorneys who had filed appearances on his behalf *O'Reilly*, 692 F 2d at 868 See also *Lanigan v. La Salle National Bank*, 609 F Supp 1000, 1002 (N D Ill 1985)"

Most federal courts have refused to even consider pro se submissions by a party represented by retained counsel. Some of the courts have even codified their barring of *pro se* filings by represented parties in their rules. In *U.S. v. Agofsky* on page 872 under Note 7, the Eighth Circuit Court listed eleven such courts.

The Eighth Circuit has itself established a policy of not considering *pro se* submissions by parties represented by retained counsel, per *Haggard v. Purkett*, 29 F.3d 469,472 (8th Cir. 1994), which states:

> "Generally, it is Eighth Circuit policy to refuse to consider *pro se* filings when a party is represented by counsel"

Also see *Wayne v. Benson*, 89 F.2d 530,535[5] (8th Cir. 1996), *U.S. v. Hale*, 978 F.2d 1016, 1018 [Note 2] (8th Cir. 1992), *U.S. v. Halverson*, 973 F.2d 1415, 1417[3] (8th Cir. 1992), and *U.S. v Payton*, 918 F.2d 54,56 [Note 2] (8th Cir. 1990).

Mello is an attorney and a member of the district court bar. The three law firms that have represented her over the course of this action employ over fifty attorneys. It is inconceivable that all of those attorneys, either through experience or through competent legal research, could have been, or remained, unaware of the eighth circuit's banning of hybrid representation per U.S.C. 28 §1654. Yet, in direct conflict with their duty of candor to the court, Mello and her attorneys repeatedly represented to the district court, the appellate court, and this Court, that 1) they were completely unaware of any case law, statutes or other authority which would indicate that Mello could not act as co-counsel with her attorneys, and 2) that Mello had a right to such hybrid representation.

It is also inconceivable that Mello and her attorneys seriously intended that Mello's entering of her attorney appearances for herself would authorize the federal courts to recognize her as an attorney representing herself as a client, rather than as a pro se. Especially since Mello is only licensed by the State of Missouri.

The Missouri Supreme Court is the sole and final arbiter of what constitutes the practice of law in Missouri and it has specifically stated that self-representation in a court of law by a natural person is not the practice of law. *Reed v. Labor And Indus. Relations Com'n* 789 S.W.2d 19,20-21[1][3] (Mo.banc 1990). Also see *Klingensmith v Thurman* 339 S.W.2d 300,301[3,4] (MoApp 1960) and *Property Exchange & Sales v Bozarth* 778 S.W.2d 1,3 (MoApp 1989). Mello, a natural person, representing herself in court, is not engaging in the practice of law.

Therefore, as Mello's self-representation is not the practice of law, and she has no client who is a party to the instant case, Mello, though an attorney, has no legal basis upon which to enter her attorney appearance in this case. Mello's sole status is that of a party.

Further, Mello's argument that she has special circumstances because her insurance counsel is limited to negligence actions, is without legal merit. First, if Mello really had the right she claims to hybrid representation, no further justification would be required. Second, insurance counsel is provided under a myriad of policies (i.e. house, car, small business, medical malpractice) and do not constitute special circumstances. Third, Mello's insurance counsel did represent Mello against an intentional tort. In the district court, when the law firm of Moser & Marsalek filed a motion to dismiss Viehweg's complaint for failure to state a claim, it was defending Mello against Viehweg's count of intentional breach of fiduciary duty. In the appellate court, when the law firm of Brinker & Doyen filed Mello's brief, it was defending Mello against Viehweg's appeal issue regarding the district court's ruling on Viehweg's count for intentional breach of fiduciary duty.

In the district court, Magistrate Judge Thomas C. Mummert, after waiting almost five months and until the end of discovery before ruling on Viehweg's motion to prevent Mello from acting as her own co-counsel, ruled, in the November 17, 1997

motion hearing, that Mello had a right to act as her own co-counsel with her attorneys. Judge Mummert's ruling was in direct conflict with the Eighth Circuit's interpretation of U.S.C. 28 §1654 banning hybrid representation, and in direct conflict with the Eight Circuit's policy of not even considering documents filed by pro se's represented by counsel.

Mello used her hybrid representation to harass Viehweg. The district court acknowledged as much when it stated that Mello and her legal counsel had double teamed Viehweg and that it wasn't fair. The harassment was so successful that Viehweg plead to the court that he was afraid of initiating discovery. Mello's desire to harass Viehweg caused two law firms to withdraw from representing her.

Viehweg was denied his due process right to the discovery process. Mello, effectively, stacked the deck against Viehweg for her motion for summary judgment. Therefore, the district court's final judgment granting Mello's motion for summary judgment in her favor was reversible error.

The Eighth Circuit per curiam opinion summarily upholding the district court's final judgment is not supported by controlling law. Further, it did not address Viehweg's appeal issue of Mello's hybrid representation in the district court. The appellate court also denied Viehweg's motion to prevent Mello's hybrid representation in the appellate court, without addressing the merits of Viehweg's motion. The Eighth Circuit's opinion is in direct conflict with its prior interpretation of U.S.C. 28 §1654 banning hybrid representation, and in direct conflict with the Eight Circuit's policy of not even considering documents filed by pro se's represented by counsel.

Further, the Eighth Circuit's unwritten policy of summarily denying oral argument to non-attorney pro se's and not denying it to attorney pro se's, is in conflict with Viehweg's right to represent himself per U.S.C. 28 §1654, and Federal Rule of Appellate Procedure 34(a)(2), which prohibits screening for oral argument based solely upon a parties representative status.

The courts have a duty to uphold the integrity of the judicial system. In this case, that duty is paramount because Viehweg, a non-attorney, is suing a member of the district court's bar for legal malpractice. The district and appellate courts have a duty to avoid the appearance of partiality. If Viehweg had to choose between representing himself pro se or being represented by counsel, then why didn't Mello? The appellate court had a duty to rule, on the merits, why Mello had a right to hybrid representation in both the district and appellate courts that Viehweg didn't have, and why Mello's hybrid representation did not violate Viehweg's due process right to discovery.

CONCLUSION

The district and appellate courts' rulings are in conflict with controlling law regarding U.S.C. 28 §1654. The Eighth Circuit has effectively ruled that Mello, an attorney party, is not bound by the statute and has a right to simultaneously represent herself while she is represented by counsel, but that Viehweg, a non-attorney party, is bound by the statute and does not have the right to simultaneously represent himself while he is represented by counsel. Such an interpretation constitutes lesser constitutional rights for Viehweg than for Mello. The Eighth Circuit, at the minimum, should be required to explain its ruling. Viehweg prays that this Court exercise its supervisory powers and grant his petition for writ of certiorari, and any other relief this court deems proper.

Respectfully submitted,

William H. Viehweg - Petitioner
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(217) 999-5061

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 98-2732

William H. Viehweg,
Appellant,
v.
Susan H. Mello,
[UNPUBLISHED] Appellee.

SUBMITTED: October 7, 1999 FILED: October 18, 1999
Before BEAM, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

William H. Viehweg appeals the district court's[1] adverse grant of summary judgment in his diversity legal malpractice action against attorney Susan Mello. Mr. Viehweg alleged Ms. Mello breached her fiduciary duty and acted negligently when she withdrew from representing him in an action against his former employer. Upon de novo review, see Kunferman v. Ford Motor Co., 112 F.3d 962, 965 (8th Cir. 1997), we conclude summary judgment was proper. We believe an extended opinion is unnecessary, and we affirm the judgment of the district court. See 8th Cir. R. 47B.

We deny all pending motions on appeal.

[1]The Honorable Thomas C. Mummert, III, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. §636(c).

A true copy.
Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 98-2732

William H. Viehweg,
Appellant,
v.

Susan H. Mello,
Appellee.

Filed December 14, 1999

The petition for rehearing filed by the appellant has been considered by the court and is denied.

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

William H. Viehweg,
Plaintiff,

v. No. 4:97CV00211 TCM

Susan H. Mello,
Defendant.

Entry of Appearance as Co-Counsel

Comes now Susan H. Mello and enters her appearance as co-counsel for the Defendant (with Brian Plegge designated lead counsel with Plaintiff directed to contact lead counsel).

Respectfully submitted,

By /s/ S. Mello
Susan H. Mello
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TRANSCRIPT OF THE PRE-TRIAL MOTION HEARING BEFORE THE HONORABLE THOMAS C. MUMMERT UNITED STATES MAGISTRATE JUDGE

VIEHWEG V. MELLO
NO. 4:97CV211

Motion hearing date: November 17, 1997

Transcript portions page 12, line 13 to page 13, line10:

THE COURT: The second issue is the issue that's been plaguing this lawsuit, -- no offense to Mr. Plegge, but plaguing this lawsuit from the beginning, and that is Ms. Mello's dual position as a litigant and as an attorney. Ms. Mello has the right, Mr. Viehweg, to represent herself. She has a right to represent herself whether she's a lawyer or not a lawyer, but the fact that she is a lawyer doesn't preclude her from being an attorney. The case you cite is not on point and has nothing to do with this lawsuit. The case you cite of Reeve vs. Labor and Industrial Relations deals with someone representing a corporation as a, -- an attorney has to come in and represent a corporation. A corporation cannot represent itself. You certainly have a right to represent yourself, as does Ms. Viehweg, -- I'm sorry, Ms. Mello. So, she certainly has that right to do that. I really don't want a response, I'm just telling you what I'm doing here. So, your Motion to strike her as an attorney and all the frivolous motions you've filed about that, and all the cases, denied. She has a right to represent herself, okay? Now, I'll agree with you to some extent, Mr. Viehweg, I don't think it's the most intelligent decision ever made in the history of juris prudence, but that's her call, okay? She has a right to do that.

Transcript portions page 13, lines 15 to 18:

THE COURT: I do not want Ms. Mello filing one pleading and Mr. Mueller filing another pleading, that has gotten ridiculous, and it's double-teaming Mr. Viehweg, and it's just not fair.

Transcript portions page 26, lines 5 to 12:

THE COURT: Okay. That's a good idea. The Court will order the parties to, -- and I'll ask Mr. Mueller, -- Mr. Mueller has a reputation before this Court and others, he's been in practice for many years, and I would expect that Mr. Mueller and you can sit down and choose a commissioner to show up, perhaps a retired judge or something like that, to sit and handle this.

MR. MUELLER: That's fine, your Honor.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

William H. Viehweg,
Plaintiff/ Appellant

v. No. 98-2732EMSL

Susan H. Mello,
Defendant/ Respondent.

ENTRY OF APPEARANCE

Comes now Susan H. Mello and enters her appearance as co-counsel for Defendant.

Respectfully submitted,

By: /s/ S. Mello
Susan H. Mello
7751 Carondelet, Suite 403
Clayton, MO 63105
(314) 721-7521
(314) 863-7779 FAX
Home No. (314) 721-3926
Co-Counsel for Defendant

Supreme Court of the United States
1998 October Term

William H. Viehweg,
Plaintiff/ Appellant

v. Docket No. 98-467

Susan H. Mello,
Defendant/ Respondent

Entry of Appearance

Comes now Susan H. Mello (and where Gary Paul and Brinker and Doyen had been designated counsel) and enters her appearance for herself[1] as the Defendant in this matter.

---

[1]Having been admitted before this Honorable court in June 1987 at her former address of 111 S. Bemiston, Clayton, Missouri, 63105.

Respectfully submitted,

By: /s/ S. Mello
Susan H. Mello
7751 Carondelet
Clayton, MO 63105
(314) 721-7521
(314) 863-7779 FAX
Defendant pro per

SUPREME COURT OF THE UNITED STATES

In Re WILLIAM H. VIEHWEG

NO. 98-467

Entered on November 16, 1998

The Court today entered the following order in the above entitled case:

The petition for a writ of mandamus and/or prohibition is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

William H. Viehweg,
Plaintiff/ Appellant

v. No. 98-2732EMSL

Susan H. Mello,
Defendant/ Respondent.

Respondent's Motion to file Corrected Brief

Comes now Respondent and moves to file the attached corrected brief to correct errors and omissions and replace the brief filed on November 9, 1998 by Brinker and Doyen. This Motion will not unduly delay the proceedings where it is filed within three days of the initial due date.

Wherefore Respondent moves for same.

By: /s/ S. Mello
Susan H. Mello USDC #3841
Attorney At Law
7751 Carondelet, Suite 403
Clayton, MO 63105
(314) 721-7521
(314) 863-7779 FAX
Defendant/Respondent

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

William H. Viehweg,
Plaintiff/ Appellant

v. No. 98-2732EMSL

Susan H. Mello,
Defendant/ Respondent.

Respondent's Supplemental Motion to file corrected Brief

Comes now Plaintiff [sic] Susan H. Mello and supplements her Motion to file correct brief [1]o [sic] the extent needed confirms that she did telephone the case manager before the initial brief was filed and the initial uncorrected brief was filed against her direction; has omission, does not correctly state the facts below or correctly address certain issues such as the standards of review. She further notes that there there [sic] can be prejudice where: A. She has followed the same lines of argument as in the initial brief, and only included the issues on the prior orders together where they shared the common issue there was no showing of any prejudicial error or abuse of discretion.[2] B. The Appellant has obtained an extension of time.

Wherefore, Respondent supplements her motion on same.

------ [1]On which she notes that while she relied on Brinker and Doyen for the representation that the case was not reported, she has since learned that the May 26, 1998 is in fact reported at 5 Fed Supp 2d 752 (E.D. Mo. 1998).

----- [2]In addition, they would also share the common issue where as in Martin v American Family, ___F3d ____ (8th Cir 1998) they were not included in the Notice of appeal.

Respectfully submitted,
By: /s/ S. Mello
Susan H. Mello USDC #3841

William H. Viehweg
114 W. 2nd South, Mt. Olive, IL 62069
(217) 999-5061

March 29, 1999

Michael E. Gans
Clerk of Court
U.S. Court of Appeals, 8th Cir.
1114 Market Street
St. Louis, Missouri 63101

RE: Viehweg v Mello 98-2732EMSL

Mr. Gans,

As this case has been fully briefed but not yet set for oral argument, per Fed. Rule of App. Proc. 28(j), Appellant cites the following supplemental authorities in support of his question presented for review challenging the trial court's decision to not disqualify Mello from acting as counsel for herself. See Appellant's Brief, page 14, third paragraph, wherein Appellant cites 28 U.S.C. §1654 and argues that Appellee Mello, per said statute, can represent herself by retained legal counsel, or, *pro se*, but not by retained legal counsel and *pro se*, simultaneously.

Not cited, heretofore, in the parties briefs, are the following three, very important, cases addressing a party's legal right to proceed *pro se* under statute 28 U.S.C. §1654:

Brasier v. Jeary 256 F.2d 474,478 (8th Cir. 1958) wherein this court states "We conclude that the appellant has no constitutional or other right to conduct his own case pro se and have the aid of counsel to speak and argue for him at the same time."

Frank M. McDermott, LTD. v Moretz 898 F.2d 418,422[8] (4th Cir. 1990) wherein the court states "because the defendant and his law firm were represented by retained counsel, defendant Moretz had no right to proceed *pro se*." and "In order for defendant Moretz to have proceeded *pro se* he must have immediately discharged the other attorneys who had filed appearances on his behalf."

Haggard v. Purkett, 29 F.3d 469,472 (8th Cir. 1994) wherein this court states "Generally, it is Eighth Circuit policy to refuse to consider *pro se* filings when a party is represented by counsel"

Appellant submits this supplemental citation because the above cases go directly to a fundamental issue, a constitutional issue, of whether Appellee Mello had a "right" to represent herself while she was simultaneously represented by retained legal counsel. The importance of said cases become apparent when this Court reviews the record on appeal, and reads the trial court judge's statements contained in the transcript of the pre-trial motion hearing on November 17, 1997, from line 13, page 12, to line 20, page 13. Said transcript, for the convenience of the Court, is provided below:

[Transcript reprinted here]

Respectfully submitted,
/s/ Wm. H. Viehweg
William H. Viehweg
Appellant

Copy: Gerard T. Noce, legal counsel for Appellee
of Noce & Buckley
515 Olive Street, Suite 800
St. Louis, MO 63101-1839

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

William H. Viehweg,
Plaintiff/ Appellant

v. Appeal No. 98-2732EMSL

Susan H. Mello,
Defendant/ Respondent.

APPELLANT'S MOTION FOR PROTECTIVE ORDER REQUIRING COMPLIANCE WITH U.S.C. 28 §1654 AND EIGHTH CIRCUIT POLICY REGARDING REPRESENTATION

COMES NOW Appellant William H. Viehweg and in support of his Motion for Protective Order Requiring Compliance with U.S.C. 28 §1654 and Eighth Circuit Policy Regarding Representation, states as follows:

1. That federal statute U.S.C. 28 §1654, while authorizing the Appellee to be represented either by retained legal counsel or *pro se*, prohibits the Appellee from simultaneously acting *pro se* while she is also represented by retained legal counsel; that if the Appellee desired to represent herself *pro se* in this appeal, then per said statute she was required to immediately discharge any counsel retained to represent her; and that if the Appellee desired to simultaneously act *pro se* while she was also represented by retained legal counsel, then she was required to obtain prior and specific authorization by this court, and that such authorization is rarely granted and only under special circumstances.

2. That in compliance with said statute, the United States Eighth Circuit Court of Appeals has a long standing policy of refusing to even consider submissions by *pro se*'s who are simultaneously represented by retained counsel.

3. That Appellee Mello, in concert with her attorneys, and with knowledge of both the above said statute's requirements and of the above said Eighth Circuit's policy, acted intentionally to circumvent said statute and policy and simultaneously represent herself *pro se* while she was also represented by retained counsel, without prior authorization from this Court, and for the true and wrongful purpose of harassing the Appellant and seeking partiality before this Court.

4. That Appellee has been represented from day one of this appeal to the present, by retained counsel - first by Scott C. Harper and Karen M. Speiser of the law firm of Brinker & Doyen and subsequently by Gerard T. Noce and Christiana M. Rush of the law firm of Noce & Buckley - and simultaneously by herself *pro se*.

5. That Appellee never sought this Court's authorization of her above said "simultaneous" representation, and even if she had, as this is not a criminal case, and as there are no special circumstances involved, this Court would have been required to deny it.

6. That Appellee's retained legal counsel not only had full and advance knowledge of Appellee's intention of representing herself *pro se* "simultaneously", but said counsel went beyond mere condoning it, to actually orchestrating it. See Exhibit 1, a true copy of Appellee's Information Form B, submitted under local rule 3B, wherein Appellee's retained counsel Ms. Speiser includes Appellee Mello, *pro se*, as co-counsel. Also see Exhibits 2 and 3, true copies of Appellee's retained counsel Mr. Noce's Entry of Appearance and subsequent Amended Entry of Appearance, in which the first entry is subsequently amended for the sole purpose of recognizing Appellee Mello as *pro se* co-counsel.

7. That the repeated attempts by Appellee Mello and her retained counsel to misrepresent her self-representation as anything other than pro se, are frivolous on their face, and must

not be considered by this Court, except to the degree that they evidence Appellee's and her retained counsel's strained efforts to circumvent said statute and policy.

8. That all of Appellee's filings with this Court are deemed to have been submitted by Appellee *pro se*, regardless of their submitting signatures, for although it is obvious that Appellee has desired to be represented by retained counsel throughout this appeal, it is equally obvious that both Appellee and her retained counsel acted in concert to wrongfully allow Appellee to "simultaneously" represent herself *pro se*, and as such, it is impossible to separate Appellee Mello's *pro se* activities from any of the filings.

9. That Appellee Mello's true purpose of said "simultaneous" representation was to double team and harass the Appellant, and further, to seek partiality from this Court, and that Appellee Mello has succeeded in both, as Appellant should not have had to respond to any of Appellee's submissions, and as this Court has not only failed to stop said unauthorized "simultaneous" representation, this Court has actually given the Appellee Mello special treatment, by considering her pro se submissions against this Court's very policy barring such considerations, and by placing both Appellee Mello's retained counsel, and the Appellee, as a pro se, on the Court's mailing list, as evidenced by Exhibits 4, 5, and 6, (true copies of letters by Clerk of Court Gans), a consideration this Court does not readily make available to parties represented by counsel.

10. That the Appellant's Constitutional right to equal and impartial justice has been violated by the Appellee's above said actions, and corrections must be made.

11. That the Appellee's actions are especially foul as the Appellant appears before this Court as a non-attorney *pro se*, in compliance with U.S.C. 28 §1654, and the Appellee, an attorney, attempts to circumvent said statute and appear before this Court in a capacity unrecognized by law, and, at the same

time, demands special standing.

12. In this case, this Court has a heightened duty to avoid, not merely the appearance of partiality, but to avoid actual partiality.

13. A Memorandum of law accompanies this motion.

THEREFORE, the Appellant prays that this Court enter a protective order prohibiting the Appellee from simultaneously representing herself pro se while she is represented by retained counsel, and to order that none of Appellee Mello's submissions to date be considered by this Court, in keeping with the above said Eighth Circuit's Policy, and lastly, for what other relief this Court deems proper.

Respectfully submitted
/s/ Wm. H. Viehweg
William H. Viehweg
114 West 2nd South
Mt. Olive, IL 62069
1-217-999-5061

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

William H. Viehweg,
Plaintiff/ Appellant

v.

Appeal No. 98-2732EMSL

Susan H. Mello,
Defendant/ Respondent.

MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S MOTION FOR PROTECTIVE ORDER REQUIRING COMPLIANCE WITH U.S.C. 28 §1654 AND EIGHTH CIRCUIT POLICY REGARDING REPRESENTATION

The federal courts have consistently held that federal statute 28 § 1654 authorizing a party to represent herself through retained counsel or *pro se*, is interpreted in the disjunctive. As such, while a party has a right to be represented by retained counsel, or the party has a right to be represented *pro se*, the party has no right to be "simultaneously" represented by both retained counsel and as a *pro se*.

The federal courts have also consistently held that in order for a party to assert its right to appear *pro se*, the party must immediately discharge any retained counsel, else waive the right to appear *pro se*.

The instant case involves Appellee Mello, a defendant party in a civil action, who is an attorney, and who, already represented by retained counsel, continues to represent herself *pro se*. Identical facts are found and addressed in *Frank M. McDermott, LTD. v Moritz* 898 F.2d 418,422[8] (4th Cir. 1990) wherein Mr. Moritz, a defendant party in a civil action,

who was an attorney, and who, though already represented by retained counsel, wanted to continue to represent himself pro se. In *Frank*, the court wrote the following:

> "Finally, we do address on the merits appellant's third and last assignment of error, viz., that the district court erred in allowing defendant Moretz to represent himself and his law firm, while both were also represented by retained counsel. In this case, because the defendant and his firm were represented by retained counsel, defendant Moretz had no right to proceed *pro se*. *O'Reilly v. New York Times Co.*, 692 F.2d 863,868 (2d Cir. 1982), Cf. *United States v. Zielie*, 734 F.2d 1447,1454 (11th Cir. 1984), cert. denied sub nom. *Gustafson v. United States*, 469 U.S. 1189, 105 S.Ct. 957, 83 L.Ed 2d 964 (1985) In order for defendant Moretz to have proceeded *pro se* he must have immediately discharged the other attorneys who had filed appearances on his behalf. *O'Reilly*, 692 F.2d at 868. See also *Lanigan v. La Salle National Bank*, 609 F.Supp. 1000, 1002 (N.D. Ill. 1985)"

A definitive (and expository) ruling was made on this very subject (as it was the only issue on appeal) way back in 1958 by this Eight Circuit Court of Appeals in *Brasier v. Jeary*, 256 F.2d 474 (8th Cir. 1958). Although *Brasier* may seem old, it has been substantially cited in many circuits over the years, including this one, as recently as *U.S. v. Agofsky* 20 F.3d 866 (8th Cir. 1994)

The federal courts have also consistently held that the courts will not even consider *pro se* submissions by a party represented by retained counsel, unless there are special circumstances and the Court, upon motion by the party and its counsel, pre-approves such "simultaneous" representation. Some federal courts have even codified their barring of *pro se*

filings by represented parties in their rules. See Note 7, page 872, in *U.S. v. Agofsky*, wherein this Court listed eleven courts with such rules.

The Eighth Circuit Court of Appeals has itself established a policy of not considering *pro se* submissions by parties represented by retained counsel, per *Haggard v. Purkett*, 29 F.3d 469,472 (8th Cir. 1994), wherein this Court states: "Generally, it is Eighth Circuit policy to refuse to consider *pro se* filings when a party is represented by counsel"

Also see *Wayne v. Benson*, 89 F.2d 530,535[5] (8th Cir. 1996), *U.S. v. Hale*, 978 F.2d 1016, 1018 [Note 2] (8th Cir. 1992), *U.S. v. Halverson*, 973 F.2d 1415, 1417[3] (8th Cir. 1992), and *U.S. v Payton*, 918 F.2d 54,56 [Note 2] (8th Cir. 1990).

Respectfully submitted
by the Appellant,

/s/ Wm H. Viehweg
William H. Viehweg
114 West 2nd South
Mt. Olive, IL 62069
1-217-999-5061

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

William H Viehweg,
Plaintiff/ Appellant
v No. 98-2732EMSL

Susan H Mello,
Defendant/ Respondent

Appellee's Reply to 3/27/99 Motion for Protective order

Comes now Appellee and for her Reply to the 3/27/99 Motion for protective order and notes as follows[1]

1 29 [sic] USC 1654 by its terms does not limit the representation Instead it provides parties or counsel may plead the case as allowed by the rules

2 This issue was already briefed by Respondent This 4/99 [sic] Motion is merely an improper attempt to seek to try to now add to the briefs as submitted in 1/99, and to the prior motions[2]

3 For the reasons in Appellee's Memos, there is no merit to appellant's claims This is especially so where he has ignored the reasons for the entry and has not claimed and cannot show any prejudice

Wherefor Appellee opposes same

[1]Appellee also notes that the factual claims in the motion are also contrary to the record Instead not only has Defendant been a part of this appeal from the beginning, (with as the file showing Mr Viehweg has refused to include Mr Noce on service copies) As the file also shows, in 11/98 what Mr Viehweg calls "retained counsel" withdrew it was not until some time after that other retained counsel entered

Even more so as Plaintiff failed to address, there are special circumstance, Defendant/Appellee is an attorney and is appearing as an attorney. What he calls "retained" counsel is from her insurance company which under Missouri law, as a matter of public policy, it cannot provide coverage for the punitive damages. It also does not provide coverage for intentional torts. Where it is defending under a reservation, (although the filings have been coordinated) she has a right to right to [sic] representation in addition to insurance provided counsel, and in that regard is representing herself.

[2]In addition, where Viehweg has sought to submit a Memo in addition to his Motion, Appellant would note that same is contrary to FRAP 27(C). His cases are not applicable.

In U.S. v Agofsky, 20 F3d 866 (8th Cir. 1994), which was a criminal case, the motion was not by an attorney, but by the defendant's mother whom the court noted "lacked the authority to act as an attorney before the court". This is quite different from an attorney who is party [sic].

Similarly, Hoggard v Purkett, 29 F3d 469 (8th Cir 1994) was a habeas proceeding in which the 8th Circuit even noted it has discretion to allow a pro se filing even when there is retained counsel.

More than that, these and other cases cited by Viehweg confirm that as done by Judge Mummert there would be no error in allowing the joint representation here.

Respectfully submitted,
By: /s/ S. Mello
Susan H. Mello USDC #3841
7751 Carondelet, # 403
Clayton, MO 63105
(314) 721-7521
(314) 863-7779 FAX
Defendant pro per

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 98-2732

William H. Viehweg,
Appellant,
v.

Susan H. Mello,
Appellee.

Appellant(s) motion for protective order requiring compliance with U.S.C. 28 Sec. 1654 and Eighth Circuit policy regarding representation is hereby ordered taken with the case for consideration by the panel to which this case is submitted for disposition on the merits.

Order Entered Under Rule 27B(a):
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM H. VIEHWEG,
Plaintiff,

v. No. 4:97CV00211 TCM

SUSAN H. MELLO,
Defendant.

JUDGMENT

In accordance with the Memorandum and Order filed this date,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of defendant Susan H. Mello and against plaintiff William H. Viehweg.

/s/ Thomas C. Mummert
Thomas C. Mummert, III
United States Magistrate Judge

Dated this 26th day of May, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM H. VIEHWEG,
Plaintiff,

v No. 4:97CV00211 TCM

SUSAN H. MELLO,
Defendant.

MEMORANDUM AND ORDER

This diversity case is before the Court on several dispositive motions and on various miscellaneous motions filed by the parties. The dispositive motions include defendant Susan Mello's two motions for summary judgment [Docs. 71, 105] and her two motions to dismiss [Docs. 86,89]. The miscellaneous motions include, but are not limited to, two motions to strike [Docs. 89,91], a "motion for order of revision of the March 30, 1998, order," [Doc. 109], and plaintiff William Viehweg's motion for leave to file a second amended complaint [Doc. 100].

Background

The following facts are generally applicable to the pending motions. Additional facts applicable to specific motions will be outlined as necessary.

William Viehweg ("Plaintiff") was hired by Inprint Systems, Inc. ("ISI") in January 1987 and fired in February 1990. (Def.'s Mtn. to Dismiss Ex. [A] at ¶ 1(D)[1] and Mtn. Ex. "K" at [68].[2]) On October 3, 1991, he consulted Susan Mello ("Defendant"), an attorney licensed to practice in Missouri and with offices in Clayton, about possible causes of action against ISI and two of its employees, David Barry and John Dultz. (Am. Compl. at ¶¶

2 and 3.) That same day, he signed a fee agreement providing, in relevant part, that he "acknowledges that no representations concerning the successful termination of the claims, or the favorable outcome of any legal action which may be filed has been made." (Pl.'s Aff. at ¶8; Def.'s Answer Ex. "A" (emphasis added).) Pursuant to that agreement, Plaintiff paid Defendant $500.00 as a "non-refundable" retainer and also agreed to pay her an hourly rate of $90.00. (Id.) Plaintiff wrote Defendant two days later, explaining what causes of action he thought he had against ISI and the two employees. (Def.'s Answer Ex. "B".)

Defendant wrote ISI on November 6, advising the company that, based on information she allegedly had received from Plaintiff, Plaintiff apparently had a cause of action against ISI for breach of contract and violation of its duties under the Employment Retirement Income Security Act ("ERISA") and that it was her policy to contact potential parties in advance of litigation to attempt to resolve the underlying disputes. (Def.'s Answer Ex. "B".) An attorney representing ISI wrote Defendant on November 11 requesting additional time within which to investigate and respond to Plaintiff's claims. (Def.'s Mtn. Ex. "D"; Pl.'s Aff. at ¶9.)

The next correspondence regarding Plaintiff's claims against ISI was a card from Plaintiff to Defendant dated January 13, 1992, inquiring about the status of his claims, requesting advice about his options, and expressing his concern that "[t]he two year statute of limitation [was] approach[ing]." (Def.'s Mtn. Ex. "E".) On January 16, Defendant wrote Plaintiff, apologizing for any delay, forwarding him copies of correspondence she had

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[1] References to "Def.'s Mtn. to Dismiss Ex.[A]" are to Plaintiff's answers to Defendant's interrogatories.

[2] References to "Def.'s Mtn. Ex." are to exhibits attached to Defendant's November 1997 motion for summary judgment.

recently received from ISI's attorney and her response, and enclosing a client information form she requested that he complete and return. (Def.'s Mtn. Ex. "F".) The January 14 letter from ISI's attorney read, in part, that:

> [Plaintiff] was not terminated for making any claim for an injury in the workplace. [Plaintiff] had a propensity to leave work without an excuse and without informing his supervisor of his desire or need to leave work. After several discussions concerning this behavior, [Plaintiff] was terminated for leaving the workplace without authorization. (Def.'s Mtn. Ex. "G".)

Defendant promptly replied to the letter, and, in her written reply, advised opposing counsel that she was assuming that he was acknowledging the validity of several claims or allegations that he did not address in his letter. (Def.'s Mtn. Ex. "H".) Opposing counsel responded by letter dated January 24, taking issue with Defendant's assumptions. (Def.'s Mtn. Ex."I".) Defendant replied to the response: opposing counsel responded to that reply; Defendant wrote an addendum on opposing counsel's response and forwarded same to counsel. (Def.'s Mtn. Ex. "J".)

On February 10, Plaintiff delivered the information he had complied at Defendant's request to Defendant's office. (Pl.'s Aff. at ¶ 11.) Included in that information was a list of various lawsuits that he had prosecuted pro se. (Def.'s Mtn. Ex. "K" at [12]-[14].) Two of those lawsuits named attorneys as defendants. (Id.) Three days later, Defendant wrote Plaintiff terminating her representation. (Def.'s Mtn. Ex. "L".) She delineated in that letter the problems she anticipated with any lawsuit against ISI arising out of Plaintiff's employment, advised him that another attorney might assess the case differently, and enclosed a list of attorneys who generally represent plaintiffs. (Id.)

On June 30, 1992, Plaintiff filed suit pro se against ISI, its owner, and another employee. (Viehweg V. Dultz, No.

4:92CV1243 CAS (E.D.Mo.)) The two individuals were sued for tortious interference of business relationship, the company was sued for violating Missouri's service letter statute and also sued under a theory of prima facie tort for discharging Plaintiff. Plaintiff explained his motive for filing the suit as a desire to establish a legal precedent that an employee's work history is a legally protectable asset. (Pl.'s Aff. at ¶ 7.) Plaintiff vigorously prosecuted his action pro se until two attorneys, Lloyd Vasquez and Grace Fuentes, entered their appearance on his behalf in May 1994 and February 1995, respectively. Plaintiff paid his lawyers an initial retainer of $11,500.00, agreed to pay an hourly rate of $120.00, and paid a second retainer of $10,000.00 in January 1995. (Def.'s Mtn. to Dismiss Ex. [A] at ¶¶ 3(C)(i)-(iii.) In his answers to interrogatories, Plaintiff listed only Defendant, Vasquez, and Fuentes as lawyers he contacted about his claims against ISI and the two individuals. (Id. at ¶ 3(F).)

In June 1995, Plaintiff dismissed his suit. (Viehweg v. Dultz, supra.) He states in his answers to interrogatories that he settled the case for $60,000.00. (Def.'s Mtn. to Dismiss Ex. [A] at ¶ 3(E).) When asked what he contended Defendant would have done to obtain a higher settlement, Plaintiff replied, "I have not contended that [Defendant] would have done anything differently than [] Vasquez and Fuentes did." (Id.)

Plaintiff does contend, however, that "[Defendant's] misrepresentations to [ISI's] lawyer about any five year agreement and about how I hurt my back, that [Defendant's] vitriolic correspondence with [ISI's] lawyer, that [Defendant's] abandonment of me and my subsequent pro se handling of the case [] damaged my ability to obtain a higher settlement and that damage is the nonimal sum of $1.00." (Pl.'s Aff. at ¶ 18.) Plaintiff alleges in his amended complaint that he "incurred medically diagnosable and medically significant, emotional and mental pain and suffering," as a result of Defendant's actions. (Am. Compl. at ¶ 22.) In his answers to interrogatories, however, Plaintiff states that he has "never been treated for

emotional distress, [has] never undergone psychological testing, though I have had twelve general counseling sessions, not directly related to any claim in this action." (Def.'s Mtn. to Dismiss Ex. [A] at ¶ 3(B).)

While Plaintiff's suit against ISI and the two individuals was pending, Defendant wrote Plaintiff on May 24, 1994, returning the written material he had given her, calculating the hours she had spent representing him, and refunding to him $40.00 of her retainer fee. (Def's Mtn. Ex. "M".)

Discussion

Motion for Leave to File Second Amended Complaint. Plaintiff requests leave to file a second amended complaint which he describes as adding neither parties nor claims. (Mtn. at ¶ 2.) The second amended complaint does include additional allegations of actions taken or not taken by Defendant during her three-month representation of Plaintiff, actions of which he clearly was aware when filing this action. This request is made one year after the seminal complaint was filed, eight months after the deadline established by the Court's case management order for amendment of pleadings, and three months after Defendant filed her motion for summary judgment.

"[It] is well settled that leave to amend should 'be freely given when justice so requires.'" **Williams v. Little Rock Mun. Water Works**, 21 F.3d 218, 224 (8th Cir. 1994) (quoting Fed.R.Civ.P. 15(a)). Thus, leave shall be granted absent a good reason for denial, e.g., undue delay, bad faith or dilatory motive, repeated failure to cure the deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment. See **Foman v. Davis**, 371 U.S. 178, 182 (1962).

The Court finds three good reasons for denying Plaintiff leave to file his second amended complaint. First, as Plaintiff reveals, the second amended complaint adds neither new parties nor new claims. Thus, denial of leave to amend would not cause him to forfeit any claim. Second, there would be undue

prejudice to Defendant, who has moved twice for summary judgment and twice to dismiss. See **Moore v. Jackson**, 123 F.3d 1082, 1089 (8th Cir. 1997) (affirming denial of leave to amend complaint after opposing party had moved for summary judgment); **Williams**, 21 F.3d at 224-25 (affirming denial of leave to amend compalint fourteen months after first complaint was filed, six days after discovery deadline, and less than three weeks before trial); **Perkins v. Spivey**, 911 F.2d 22, 34-35 (8th Cir. 1990) (affirming denial of leave to amend complaint eighteen months after first complaint filed); **Thompson-El v. Jones**, 876 F.2d 66, 67 (8th Cir. 1989) (denying leave to amend complaint to add four new defendants in case which had been pending for 18 months, discovery had been completed for six weeks, summary judgment motions were due two weeks before, and trial was to begin in two weeks). Third, for the reasons set forth below, the amendments would be futile. See **Wald.v Southwestern Bell Corp. Customcare Medical Plan**, 83 F.3d 1002, 1005 (8th Cir. 1996) (district court did not abuse its discretion in denying party leave to amend complaint to add count which would not have stated cause of action); **Fuller v. Secretary of Defense of U.S.**, 30 F.3d 86, 88-89 (8th Cir. 1994) (denial of leave to amend complaint to add claim which required exhaustion of administrative remedies was not abuse of discretion).

Motion for Order of Revision. By order of March 30, 1998, the Court granted Defendant's motion to dismiss Count III of the First Amended Complaint on the grounds that the count was based on the same actions as gave rise to Count I but was simply rephrased as a separate claim. Plaintiff requests that the Court reconsider that order, stating that Count I alleged that Defendant violated a duty owed him when not litigating his claims against David Barry, owner of ISI, and Count III alleged that Defendant violated a duty owed him when not litigating his claim against John Dultz. Plaintiff further states that his reference to Barry in Count III was a typographical error and

that the other references to John Dultz were accurate. Defendant opposes the motion, arguing, inter alia, that such motions for reconsideration are not permissible.

This Court has the inherent power to reconsider and modify an interlocutory order any time prior to entry of judgment. See **Murr Plumbing, Inc. v. Scherer Bros. Financial Services Co.**, 48 F.3d 1066, 1070 (8th Cir. 1995); **Lovett v. General Motors Corp.**, 975 F.2d 518, 522 (8th Cir. 1992). Thus, the Court may depart from an earlier holding if it is convinced that the holding is incorrect. See **Id.**

The Court's earlier ruling dismissing Count III was premised on the apparently mistaken reading that it was against Barry. The court notes that John Dultz is named as the defendant in other paragraphs in the count. Accordingly, the court will grant Plaintiff's motion, set aside its earlier order, and deny the motion to dismiss as to Count III.

Motions for Summary Judgment. Defendant moves for summary judgment on the grounds that (i) Plaintiff can not establish any causation between her actions and any damages incurred by him; (ii) she has no duty to represent a client when that representation could result in a violation of court rules; and (iii) she never assumed the duty of representing Plaintiff in litigation against ISI and its employees. Plaintiff counters, in part, that Defendant withdrew from representing him because of her personal repugnance to his previous litigation against lawyers and that she improperly abandoned him when she knew, or should have known, that Plaintiff would encounter hardships and prejudice if he had to proceed against ISI pro se.

In a supplement to her motion for summary judgment, Defendant further argues that she decided when first speaking with Plaintiff in October 1991 not to represent him in his suit against the two employees and that Plaintiff should have known this at least by November 1991 and, consequently, his two claims relating to those two employees are barred by the five year statute of limitations for legal malpractice actions.

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." See **Celotex Corp. v. Catrett**, 477 U.S.317, 322 (1986). An issue of material fact is genuine if it has a real basis in the record; and, a genuine issue of fact is material if it "might affect the outcome of the suit under the governing law." **Hartnagel v. Norman**, 953 F.2d 394, 395 (8th Cir. 1992) (citations omitted)

The initial burden is on the moving party to clearly establish the non-existence of any genuine issue of fact that is material to a judgment in its favor. See **City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.**, 838 F.2d 268, 273 (8th Cir. 1988). After the moving party discharges this burden, the non-moving party must do more than show that there is some doubt as to the facts. See **Matsushita Elec. Indus. Co. v. Zenith Radio Corp.**, 475 U.S. 574, 586 (1986). Instead, the non-moving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. See **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 249 (1986). All disputed facts are to be resolved, and all inferences are to be drawn, in favor of the non-moving party. See **Kopp v. Samaritan Health Sys., Inc.**, 13 F.3d 264, 269 (8th Cir. 1993).

Conclusive assertions of ultimate fact are entitled to little weight, however, when determining whether a nonmovant has shown a genuine issue of fact sufficient to overcome a summary judgment motion properly supported by depositions or affidavits. See **Miller v. Solem**, 728 F.2d 1020, 1024 (8th Cir. 1984). Moreover, where the unresolved issues are primarily legal, rather than factual, summary judgment is particularly appropriate. See **Crain v. Board of Police Comm'rs**, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

Plaintiff alleges in Count I that Defendant breached a fiduciary duty owed him when terminating their attorney-client

relationship prior to the conclusion of his claims against David Barry; in Count II that Defendant breached the same duty in the same way prior to the conclusion of his claims against ISI; and in Count III that Defendant breached the same duty in the same way prior to the conclusion of his claims against John Dultz.

A claim of legal malpractice has four elements: (1) an attorney-client relationship; (2) negligence or breach of contract by the attorney; (3) proximate causation of plaintiff's damages; and (4) damages to the plaintiff. See **Klemme v. Best**, 941 S.W.2d 493, 495 (Mo. 1997) (en banc); **Huber v. Magna Bank of Missouri**, 959 S.W.2d 812, 814 (Mo.Ct. App. 1997); **McDowell v. Waldron**, 920 S.W.2d 555, 559 (Mo.Ct. App. 1996). A claim of breach of fiduciary duty, or constructive fraud, has five elements: (1) an attorney-client relationship; (2) breach of a fiduciary obligation by the attorney; (3) proximate causation; (4) damages to the plaintiff; and (5) no other recognized tort encompasses the facts alleged. See **Klemme**, 941 S.W.2d at 496. The second and fifth elements distinguish a claim of breach of fiduciary duty from a claim of legal malpractice. See **Id.** If the complained-of actions by the attorney can be characterized as both negligence and a breach of a fiduciary obligation, then the sole claim is legal malpractice. See **Id.**

Plaintiff complains that Defendant breached an obligation owed him by terminating her representation of him, knowing that he would be unable to persuade another attorney to take his claims, and thereby forcing him to litgate his claims himself, although he was not competent to do so. Regardless whether Plaintiff's complaint is characterized as one of legal malpractice or a breach of fiduciary duty, he has failed to establish that Defendant breached a duty to him, that her action was the proximate cause of any damages he incurred, or that he sustained any damages.

Plaintiff alleges that Defendant terminated their attorney-client relationship because she was repulsed by his lawsuits

against lawyers; Defendant counters that she terminated the relationship because of ethical considerations. Under either explanation, Defendant had no unperformed duty to Plaintiff. "[A]n attorney may properly withdraw from representation when he or she determines that the matter should not be brought to suit. Indeed, such a principle is manifest from such mechanisms as Fed.R.Civ. P. 11, which actually punish an attorney from pursuing a suit that is not properly maintainable under the governing substantive law." **Riordan v. Jones**, 793 F.Supp. 650,651 (D.Md. 1992). And, under Rule 4(b)(3) of the Missouri Supreme Court Rules, when no proceedings are pending before a tribunal, a lawyer may withdraw from representing a client when "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." See also American Bar Association Model Rules of Professional Conduct 1.2 Comment [1]("[A] lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.")

In addition to failing to establish a breach of duty, Plaintiff has also failed to establish that Defendant's termination of their attorney-client relationship was the cause of any damages incurred by him.

The attorney-client relationship between Plaintiff and Defendant began in October 1991 and ended in February 1992. Plaintiff makes several references in the pleadings to a statute of limitations which would run out on his claims in June 1992 -- two and one-half years after his termination from ISI. Missouri, however, provides for a five year statute of limiations for actions "for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another . . ", Mo. Rev. Stat. § 516.120(4), and for "actions for relief on the ground of fraud. . .", **id.** at § 516.120(5). See **Ryder v. Ward**, 933 S.W.2d 428, 430 (Mo. Ct. App. 1996) ("statute of limitations for tort claims is five years"). Thus,

regardless whether Plaintiff characterizes his action against ISI, Barry, and Dultz as one for tortious interference with business relationship,[1] fraud, or for the injury to his work history, the action was governed by the five year statute of limitations. Even if the court were to accept, however, Plaintiff's allegation that a two and one-half year limitation period governed his claim, he had, at the minimum, six months within which to retain new counsel.

In **Faulkner v. Ensz**, 109 F.3d 474 (8th Cir. 1997), a former client sued an attorney she had consulted about filing a possible Title VII sex discrimination claim. The attorney had turned his file on the plaintiff's case over to another attorney, with plaintiff's knowledge, a month before the deadline for filing an administrative charge. **Id.** at 476. The other attorney contacted the plaintiff after the deadline had passed and told her that she (the attorney) was not interested in pursuing the case because of the statute of limitations problem. **Id.** The Eighth Circuit Court of Appeals found that the sued attorney's involvement ended in May 1991 when he gave the file to another attorney and concluded that the plaintiff's suit failed on the causation element, noting that "[u]nder Missouri law, a successful attorney malpractice claim requires a causal connection between the attorney's negligence and the plaintiff's damages." **Id.** "To prove damages and causation, the plaintiff must establish that 'but for' the attorney's negligence the

[1] The prima facie elements in Missouri of a claim of tortious interference with business relationship are: existence of a valid business relationship; knowledge of the relationship or expectancy on the part of the defendant; an intentional interference with inducing or causing a breach or termination of the relationship or expectance; the absence of justification; and rsultant damages to the party whose relationship or expectancy had been disrupted. See **Williams v. Blumer**, 763 S.W.2d 242, 246 (Mo.Ct. App. 1988).

result of the underlying proceeding would have been different.'" **Id.** (quoting London v. Weitzman, 884 S.W.2d 674, 677 (Mo.Ct. App. 1994)). "'But for' is an absolute minimum for causation because it is merely causation in fact. . . . [T]here [must] be some causal relationship between the defendant's conduct and the injury or event for which damages are sought.'" **Id.** (quoting Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 862 (Mo. 1993) (en banc)) (alterations in original). See also **Rodgers v. Czamanske**, 862 S.W.2d 453, 457 (Mo.Ct. App. 1993) (plaintiff in legal malpractice case must prove that, but for attorney's complained-of actions, result of underlying proceeding would have been different).

In **Riordan**, supra, the father of a child injured in a bicycle accident sued three attorneys he had consulted about filing a product liability against the nanufacturer. The attorneys had each concluded that the suit would be without merit, and withdrew from representing the father. The father sued the attorneys for malpractice, alleging that the child suffered redressable injury as a result of their withdrawal. The district court granted the attorneys summary judgment, noting that "it has been consistently held that where, as here, there is sufficient time to engage new counsel and file suit, there is no malpractice." **Riordan**, 793 F.Supp. at 651. See also **Steketee v. Lintz, Williams & Rothberg**, 38 Cal. 3d 46, 694 P.2d 1153, 210 Cal.Rptr. 781 (1985)(en banc) ("[a]n attorney cannot be held liable for failing to file an action prior to the expiration of the statute of limitations if he ceased to represent the client and was replaced by other counsel before the statute ran on the client's action").

In the instant case, Defendant was not immediately replaced by other counsel. The Court finds that this fact is not material. As noted above, Plaintiff had time within which to secure other counsel; however, Plaintiff has stated that he did not attempt to do so. See **Medrano v. Reyes**, 902 S.W.2d 176, 178 (Tex. Ct.App. 1995) (affirming grant of summary judgment to law

firm who had withdrawn from representation 21 months before running of statute of limitations and holding that firm should not be held liable for failing to file an action on behalf of plaintiffs before the expiration of statute of limitations where there was sufficient time for the employment of other counsel before expiration period); **Harvey v. Mackay**, 109 Ill. App. 3d 582, 587, 65 Ill. Dec. 167, 440 N.E.2d 1022 (1982) (attorney's failure to file lawsuit prior to expiration of staute of limitations not malpractice where attorney withdrew from representation one year before expiration period). Moreover, Plaintiff has not alleged, nor is there any indication in the record to support such an allegation, that Defendant interfered or otherwise obstructed Plaintiff in any effort to secure counsel. Additionally, Plaintiff's action was not barred by the statute of limitations. He filed the suit pro se in June 1992 and settled it, represented by counsel, in June 1995. He stated in his answers to interrogatories that there is nothing that Defendant would have done that would have secured him a higher settlement. Thus, Plaintiff was adequately represented by two other attorneys in the litigation about which he initally consulted Defendant and was satisfied with their representation and the results. Plaintiff, therefore, can not establish any causal connection between any fault he may now find with the underlying litigation and Defendant's complained-of actions. See **Cain v. Hershewe**, 760 S.W.2d 146, 150 (Mo. Ct. App. 1988). See also **Cain v. Webster**, 770 S.W.2d 327, 330-31 (Mo. Ct. App. 1989) (per curiam) (Plaintiff failed to establish submissible case of legal malpractice when he failed to establish what defendant did or omitted which caused his damages).

Moreover, even if Plaintiff were not satisfied with the results obtained by his new attorneys, his decision not to contact any attorneys until he contacted Fuentes and Vasquez and their subsequent control of the underlying litigation are intervening causes. "An intervening cause is a new and independent force which interrupts the chain of events initiated by the defendant's

negligence in such a significant manner as to become the direct and proximate cause of the plaintiff's damages." **Rodgers v. Czamanske**, 862 S.W.2d 453, 458 (Mo. Ct. App. 1993). Actions taken by subsequent attorneys affecting the disposition of the litigation may be an intervening cause. See Id. (dismissal of counterclaim by attorney who represented plaintiff after defendant was intervening cause). See also **Faulkner**, 109 F.3d at 476-77 (new attorney's assumption of case was intervening cause). Similarly, Plaintiff's failure to seek other counsel to prosecute his suit against ISI, therefore rendering it necessary that he file the suit pro se, is an intervening cause of his initially prosecuting that suit pro se.

In order to prevail on his claims against Defendant, Plaintiff must establish that there were damages proximately resulting from her actions, and the measure of those is the amount he would have received"but for" Defendant's negligence. See **Steward v. Goetz**, 945 S.W.2d 520, 532 (Mo. Ct. App. 1997). "'[D]amages are speculative . . . if the uncertainty concerns the fact of whether there are any damages rather than the amount.'" **London**, 884 S.W.2d at 677 (quoting R.E.Mallen and J.M. Smith, Legal Malpractice, Vol. a, § 16.3 (3rd ed. 1989)).

Plaintiff has failed to establish that he incurred any damages as a result of Defendant's actions - - he is satisfied with the results in the underlying litgation and does not contend that Defendant could have achieved more satisfactory results. See **Lange v. Marshall**, 622 S.W.2d 237, 239 (Mo. Ct. App. 1981) (reversing award of damages to plaintiff in legal malpractice case in which she had failed to establish that had defendant done the things she contended he should have done that she would not have incurred incidental fees and expenses that she claimed as damages).

Additionally, the Court notes that Plaintiff does not have expert testimony to support his claims. "'[E]xcept in clear and palpable causes (such as the expiration of a statute of limitation), expert testimony is necessary to establish the

parameters of acceptable professional conduct, a significant deviation from which would constitute malpractice.'" **Cooper v. Simon**, 719 S.W.2d 463, 464-465 (Mo. Ct. App. 1986) (quoting Hughes v. Malone, 146 Ga.App. 341, 247 S.E.2d 107, 111 (1978)). See also **Bross v. Denny**, 791 S.W.2d 416, 421 (Mo. Ct. App. 1990) (holding to same effect). In other words, expert testimony is necessary if the type of negligence alleged is not so clear that it could be assessed without the aid of expert testimony and, consequently, a jury would have to resort to pure speculation in order to find negligence on the part of an attorney. See **Cooper**, 719 S.W.2d at 465.

The negligence or breach of duty alleged by Plaintiff is not so clear and palpable that it can be assessed without the aid of expert testimony. Moreover, the court rejects as meritless Plaintiff's contention that he is competent to give expert testimony in his legal malpractice case because he, as a pro se lititgant, is expected to follow the civil rules of procedure and the local rules.

For the foregoing reasons, the Court will grant Defendant's motion for summary judgment on each of the three pending counts. The Court will, therefore, not reach the merits of Defendant's supplemental motion for summary judgment or the two motions to dismiss.

Motion to Seal. Defendant requests that this Court order the transcript of her deposition and the videotape of that deposition sealed, citing, inter alia, confidential matters disclosed during that deposition. This Court will grant this motion and direct the Clerk's Office to seal the transcript and videotape deposition, including the copy of the transcript attached as an exhibit to Plaintiff's response to Defendant's motion for summary judgment, docket number 95.

All other pending motions will be denied as moot.

Conclusion

Defendant's request for summary judgment on each of the three counts of Plaintiff's complaint is meritorous based on

Plaintiff's failure to refute her showing that there is no genuine issue of material fact as to the elements of a claim of legal malpractice or a claim of breach of fiduciary duty.

Accordingly,

IT IS HEREBY ORDERED that plaintiff William H. Viehweg's Motion for Order of Revision of March 30, 1998, Order is **GRANTED**. [Doc. 109]

IT IS FURTHER ORDERED that plaintiff William H. Viehweg's Motion for Leave to File Second Amended Complaint is **DENIED**. [Doc. 100]

IT IS FURTHER ORDERED that defendant Susan H. Mello's Motion for Summary Judgment is **GRANTED**. [Doc.71]

IT IS FURTHER ORDERED that defendant Susan H. Mello's motion to seal the transcript and videotape of her deposition is **GRANTED**. [Doc. 90] The Clerk's Office is hereby directed to seal the transcript of her deposition docketed as number 94 and the copy of that transcript attached as an exhibit to Plaintiff's pleading docketed as number 95.

IT IS FURTHER ORDERED that all remaining pending motions are **DENIED** as moot.

IT IS FINALLY ORDERED that separate judgment shall be entered in favor of Defendant and against Plaintiff in the instant cause of action.

/s/ Thomas C. Mummert
Thomas C. Mummert, III
United States Magistrate Judge

Dated this 26th day of May, 1998.